

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

DOROTHY MINTER,

Supreme Court Case No. 133988

Plaintiff-Appellee,

Court of Appeals Case No. 273017

v

Kent County Circuit Court
Case No. 03-05719-NI

**CITY OF GRAND RAPIDS and
JOHN EDWARD RHEEM WETZEL,**

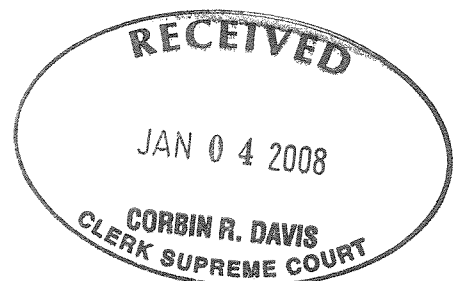
Defendants-Appellants.

DEFENDANTS' SUPPLEMENTAL BRIEF

ON ORAL ARGUMENT ON THE APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

- I. DID THE COURT OF APPEALS MAJORITY CORRECTLY APPLY *KREINER V FISCHER*, 471 MICH 109 (2004) IN PARTIALLY REVERSING THE KENT COUNTY CIRCUIT COURT'S ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION?

| | |
|------------------------------------|----------------|
| Plaintiff's Answer: | Yes |
| Defendants' Answer: | No |
| Trial Court's Answer: | Did Not Answer |
| Court of Appeals Majority Answers: | No |
| Court of Appeals Dissent Answers: | Yes |

JUDGMENT OR ORDER APPEALED FROM

Defendants appeal from the published Court of Appeals opinion dated April 12, 2007, in Court of Appeals Docket No. 273017. The Court of Appeals opinion was authored by Judge Alton T. Davis and contained a concurring opinion by Judge Peter D. O'Connell, as well as a concurrence / dissent by Judge Christopher M. Murray.

RELIEF SOUGHT

Given the limitation of issues under review as set forth in Court's order granting oral argument on the application, Defendants request that this Honorable Court enter a peremptory order **REVERSING** the Court of Appeals decision and **REINSTATING** the trial court's order granting summary disposition to Defendants on all counts.

ARGUMENT

I. INTRODUCTION

By Order dated December 13, 2007, this Court granted oral argument on Defendants' application for leave to appeal the April 12, 2007 judgment of the Court of Appeals. This Court's order directed the parties to address whether the Court of Appeals majority correctly applied *Kreiner v Fischer*, 471 Mich 109 (2004) in partially reversing the Kent County Circuit Court's order granting Defendants' motion for summary disposition.

Defendants contend that the Court of Appeals majority erred in failing to correctly apply the standards set forth in *Kreiner*, when the Court of Appeals partially reversed the trial court's order granting Defendants' motion for summary disposition. Given the published nature of the Court of Appeals decision, its erroneous analysis will be damaging to the case law of this state, as it will be precedentially binding on other panels of the Court of Appeals and on the trial courts. The decision of the Court of Appeals on the *Kreiner* issue constitutes error requiring reversal.

If the *Kreiner* issue is the only issue of those presented in Defendants' application for leave to appeal which the Court deems worthy of review at this time, then this Court should enter a peremptory order **REVERSING** the Court of Appeals decision and **REINSTATING** the trial court's order granting summary disposition to Defendants on all counts.¹

¹ While recognizing that the issue is not within the scope of the supplemental briefing and oral argument permitted on this application for leave to appeal, Defendants must nonetheless point out that any order reversing the Court of Appeals decision and reinstating the trial court's order granting summary disposition to Defendants must necessarily address the Court of Appeals ruling on Plaintiff's claim of permanent serious disfigurement.

II. SCOPE OF SUPPLEMENTAL BRIEFING AND ORAL ARGUMENT.

Only two of Plaintiff's claimed injuries remain at issue on this appeal: the mild closed head injury and the facial scar. The trial court ruled that the other claimed injuries (i.e., cervical strain and broken toe) failed to satisfy the statutory threshold set forth in MCL 500.3135, as analyzed under this Court's opinion in *Kreiner*. The Court of Appeals affirmed that ruling, and Plaintiff did not appeal. Therefore, the cervical strain and broken toe injuries are not at issue before this Court.

This Court's peremptory order only directed the parties to address whether the Court of Appeals majority correctly applied *Kreiner*. Neither *Kreiner* nor its consolidated case, *Straub v Collette*, involved a claim of permanent serious disfigurement. Therefore, Defendants understand this Court's order to restrict oral argument on the application solely to issues of the claimed serious impairment of body function (involving the mild closed head injury), not to any issues of the claimed permanent serious disfigurement (involving the facial scar).

III. THE NO-FAULT STATUTE AND *KREINER*.

The Michigan No-Fault Act provides that a person remains subject to tort liability for noneconomic loss caused by his or her ownership or use of a motor vehicle "only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). The statute further defines the phrase "serious impairment of body function" to mean "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

Defendants do not dispute that Plaintiff suffered a mild closed head injury, which was causally related to the auto accident at issue in this case. In the trial court and on appeal, Defendants furthermore agreed that the closed head injury represented an impairment of an important body function, and that the injury was objectively manifested. However, Defendants have always maintained that Plaintiff's mild closed head injury did not qualify as "serious impairment of body function" for purposes of MCL 500.3135 because it did not affect Plaintiff's general ability to lead her normal life.

Furthermore, Defendants have always maintained that there is no factual dispute concerning the nature and extent of Plaintiff's mild closed head injury. Even if there were a factual dispute concerning the nature and extent of Plaintiff's mild closed head injury, any such dispute would not be material to the determination whether Plaintiff suffered a serious impairment of body function or permanent serious disfigurement. Thus, whether Plaintiff's impairment meets the threshold for recovery of non-economic damages is properly a question of law for the courts to decide. MCL 500.3135(2)(a).

In *Kreiner*, this Court provided guidelines by which the lower courts were to apply the provisions of MCL 500.3135, the statutory threshold for recovery of non-economic damages arising from an auto accident. That decision included standards for determining when an impairment has reached the point of affecting the plaintiff's "general ability to lead his or her normal life." This Court noted that what is a "normal" life must be determined subjectively on the basis of the plaintiff's own pre-accident life, not the life of some objective third party. Once that is fixed as the base, it is then to be objectively determined whether the impairment in fact affects the plaintiff's "general ability to lead" that life. *Kreiner, supra* at 122, n 7.

This Court held that determining whether an impairment affects a plaintiff's "general ability" to lead her normal life requires considering whether she is "generally able" to lead her normal life. If she is generally able to do so, then her general ability to lead her normal life has not been affected by the impairment. Determining whether a plaintiff is "generally able" to lead her normal life requires considering whether she is, "for the most part" able to lead her normal life. *Id.* at 130.

The starting point in analyzing whether an impairment affects a person's general ability (i.e., overall ability) to lead her normal life should be identifying: (1) how her life has been affected; (2) by how much; and (3) for how long. *Id.* at 131. "Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life." *Id.* Merely "any effect" on a plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's ability to lead her life. *Id.* at 133. Further, a negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the person is still generally able to lead her normal life. *Id.* at 137.

The trial courts are directed to consider the following non-exhaustive list of objective factors in evaluating whether the plaintiff's "general ability" to conduct the course of her normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. *Id.* at 133. Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain, do not establish the extent of any residual impairment. *Id.* at 133, n 17.

Furthermore, the course or trajectory of the plaintiff's normal life must be affected, before an impairment can be said to satisfy the threshold injury standards set forth in the statute. *Id.* at 130-131.

In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. [*Id.* at 132-133.]

IV. PLAINTIFF'S MILD CLOSED HEAD INJURY.

A. Medical Records and Plaintiff's Testimony.

Plaintiff treated with two physicians regarding her mild closed head injury: Dr. Christian Vandenberg and Dr. Mervyn Smith. Plaintiff first treated with Dr. Smith, visiting his office on September 18, 2002, one month after the auto accident.² Dr. Smith diagnosed a closed head injury with symptoms of headaches and dizziness, and referred Plaintiff to the Mild Brain Injury Clinic at Spectrum Hospital, where Plaintiff could be seen by a specialist who regularly diagnoses and treats closed head injuries.

From October 3, 2002 through December 17, 2002, Plaintiff treated with Dr. Vandenberg, the medical director of the Mild Brain Injury Clinic. His medical records and testimony indicated his opinion that any negative impacts caused by Plaintiff's closed head injury had resolved, within four months of the auto accident. As of December 17, 2002, Dr. Vandenberg opined that there were "very little residual

² Neither Plaintiff nor Defendants deposed Dr. Smith. Further, Defendants are not in possession of any medical records from Dr. Smith, other than those provided to the trial court by Plaintiff in response to Defendants' motion for summary disposition. These records encompass the time period from September 18, 2002 through October 31, 2003. (Exhibit 10 to Plaintiff's Brief in Opposition to Defendants' Summary Disposition Motion, Trial Court Record).

problems left related to her brain injury,” and he “didn’t feel she needed any further treatment for her mild traumatic brain injury.”³

Dr. Vandenberg referred Plaintiff to his physical therapist, vestibular therapist, and speech and language therapist, who all completed their treatments by November 27, 2002. He never prescribed in-home assistance for Plaintiff, and never restricted any daily activities.⁴ Dr. Vandenberg testified that Plaintiff “met all the short-term and long-term goals of therapy, and was therefore discharged from therapy,” and in his medical judgment, Plaintiff did not need any continued therapy after late November 2002.⁵ Dr. Vandenberg also concluded that Plaintiff’s complaints of dizziness were “fading away” as of December 17, 2002, and on that date, he concluded that dizziness “wasn’t a concern any longer of any significance.”⁶ Plaintiff never returned to Dr. Vandenberg with any complaints or to seek treatment, after December 2002.

Plaintiff returned to treat with Dr. Smith on March 10, 2003, after she had been successfully discharged from treatment by Dr. Vandenberg. Although she continued to voice complaints of headaches and dizziness, Dr. Smith’s office notes do not indicate how frequently she claimed to experience those symptoms. As of March 10, 2003, Dr. Smith opined in his medical records that Plaintiff’s condition was “a toss up between the closed head injury and a sinus infection.”⁷ Dr. Smith recommended that Plaintiff take over-the-counter Tylenol and an antibiotic for the sinus infection. While Dr. Smith also

³ Brief Supporting Defendants’ Summary Disposition Motion, Exhibit F, p 69 (Trial Court Record).

⁴ *Id.*, Exhibit F, pp 24-25.

⁵ *Id.*, Exhibit F, pp 21-23.

⁶ *Id.*, Exhibit F, p 29.

⁷ Plaintiff’s Brief Opposing Defendants’ Summary Disposition Motion, Exhibit 10 (Trial Court Record).

prescribed Plaintiff Vicodin from September 18, 2002 through April 16, 2003, his office notes contain no mention of prescribing that drug after the latter date.⁸

Dr. Smith's office notes, which Plaintiff provided to the trial court, end on October 31, 2003. When Plaintiff was subsequently deposed on January 26, 2004, she described issues which she attributed to her mild closed head injury. This included complaints of headaches, memory problems, sleeping problems, dizziness, and vision problems. Thus, a close review of Plaintiff's deposition testimony becomes necessary.

Plaintiff testified that, immediately after the August 15, 2002 auto accident, she had headaches "regularly," meaning two to three times per day, lasting 30-45 minutes in duration.⁹ At her January 2004 deposition, she testified that she still had daily headaches, which "just come and go." Plaintiff also testified that although she was treating with Dr. Smith for that issue, he did not prescribe any medication in response to any complaints of headaches.¹⁰ Further, there is no evidence in the record that either Dr. Smith or any other doctor imposed any restrictions on Plaintiff's activities, or prescribed any medications, related to these complaints of headaches.

Plaintiff also testified that she experienced some memory difficulties. She testified that she "can be talking and forget what I'm talking about sometimes." She also testified that she sometimes forgets to turn off the stove after cooking. However, she

⁸ *Id.* The discovery period in this case closed on February 27, 2004. Given an intervening, interlocutory appeal on issues of governmental immunity, Defendants did not file the summary disposition motion regarding the threshold injury question until June 26, 2006, and the trial court did not rule on that motion until August 18, 2006. No discovery transpired between February 27, 2004 and August 18, 2006, and Plaintiff did not provide any medical records regarding that latter time period to the trial court.

⁹ Plaintiff Dorothy Minter's Deposition Transcript, Brief Supporting Defendants' Summary Disposition Motion, Exhibit B, p 32.

¹⁰ *Id.*, Exhibit B, pp 32-34.

stated that she had not consulted any doctor for treatment related to any memory difficulties.¹¹

Plaintiff testified that she had problems sleeping immediately after the auto accident, but testified that those problems did not last longer than six months, and by the time of her deposition, she reported that "I sleep fairly well."¹² Plaintiff also testified that she experienced dizziness and trouble balancing, immediately after the accident. However, by the time of her deposition, she reported being dizzy only "once in a while," maybe "twice a month."¹³ Plaintiff also testified that she was experiencing "blurry" vision. However, she testified that when she had her vision checked, the doctor "didn't find anything wrong with my vision."¹⁴

This is the sum total of Plaintiff's testimony regarding how her closed head injury allegedly affected her general ability to lead her normal life, and how the injury allegedly changed the course or trajectory of her normal life. Plaintiff has not indicated any life activities which she was rendered incapable of performing, post-impairment, due to the mild closed head injury.¹⁵ Further, she cannot point to a single physician-imposed restriction on her life activities, related to the impairment of the mild closed head injury.

B. Post-Impairment Changes in Plaintiff's Life.

Considered against the backdrop of her pre-accident life, Plaintiff's post-accident life is not so different that her "general ability" to lead her normal life has been affected.

¹¹ *Id.*, Exhibit B, p 35, 40.

¹² *Id.*, Exhibit B, pp 34-35.

¹³ *Id.*, Exhibit B, p 36.

¹⁴ *Id.*, Exhibit B, p 64.

¹⁵ Plaintiff has also claimed an inability to run, wear high heeled shoes, and dance to music that she hears over the radio. She also claimed that she stopped playing card games with her sisters. However, Defendants understand those claims to be related to Plaintiff's cervical strain injury and resultant complaints of residual neck and shoulder pain, not to Plaintiff's closed head injury.

Because Plaintiff's normal life has not been affected, she has failed to satisfy the "serious impairment of body function" threshold for recovery of non-economic damages.

Plaintiff was 67 years old at the time of the accident, which occurred on August 15, 2002.¹⁶ Plaintiff was receiving both age and disability-related social security benefits before the accident, having received disability-related benefits since 1996.¹⁷ Plaintiff had a kidney removed in 1993, and had worn an urinostomy bag for years, before this auto accident occurred. Plaintiff testified that the kidney removal caused her chronic, long-term back pain and that her pre-accident disability prevented her from doing any lifting and prevented her from standing for long periods of time.¹⁸

While Plaintiff's counsel claims in his brief that "Plaintiff was completely independent in all aspects of daily living prior to the collision,"¹⁹ that claim is contradicted by the deposition testimony of Plaintiff's daughter, Felicia Bryant. Her testimony indicated that Plaintiff received significant assistance with household chores, prior to this auto accident. Ms. Bryant testified that she was living with her mother in August 2002, when the auto accident occurred, having lived there since November 2001.²⁰ Ms. Bryant further testified that at the time of the accident, her sister and two nephews also lived in Plaintiff's home.²¹ Ms. Bryant testified that Plaintiff did not drive a car before the accident, and that Ms. Bryant's sister Gloria and niece Shontia drove Plaintiff where she needed to go, both before and after the auto accident.²²

¹⁶ Therefore, Plaintiff is now 71 or 72 years old.

¹⁷ Plaintiff Dorothy Minter's Deposition Transcript, Brief Supporting Defendants' Summary Disposition Motion, Exhibit B, pp 10, 12, Trial Court Record.

¹⁸ *Id.*, Exhibit B, pp 13-14.

¹⁹ Plaintiff's Brief Opposing Defendants' Application for Leave to Appeal, p 24.

²⁰ Felicia Bryant's Deposition Transcript (Exhibit A to this Supplemental Brief), pp 6-7.

²¹ *Id.*, pp 7-8.

²² *Id.*, p 21.

Ms. Bryant testified that, before the auto accident, she performed various household chores for her mother:²³

[Ms. Mish] Q: Now, since you lived there, did you help with any of that [household chores] before the accident?

[Ms. Bryant] A: Yes. I clean up.

Q: Let's try to get a list of what you might have done in the house before the accident happened. You said cleaning up the house?

A: Yep.

Q: Any other tasks that you normally would do before the accident?

A: Oh, do some of the laundry, sweep the stairs down, wipe the floors.

Q: Okay. Did you prepare any of the meals?

A: Yeah, I cooked.

[Mr. Grayell] Q: This is before the accident you did all these things?

[Ms. Bryant] A: Sometimes.

[Mr. Grayell] Q: Okay.

Ms. Bryant testified that, before the auto accident, she prepared meals for Plaintiff about once per week, when Plaintiff "had a headache or was real tired." Ms. Bryant also testified that, before the auto accident, she did laundry twice per week, and Plaintiff did laundry three times per week.²⁴ Ms. Bryant also testified that she shared with Plaintiff the task of taking garbage to the curb, before the accident.²⁵

Most importantly, Ms. Bryant testified that, after the auto accident, she did not perform any household chores for her mother than she wasn't already performing before the auto accident.²⁶

[Ms. Mish] Q: . . . Now, there's a claim in this case that you provided some in-home services for your mother after the accident. And we've talked a little bit about household chores you were already doing before the auto accident. Can you tell me if

²³ *Id.*, p 13.

²⁴ *Id.*, p 14.

²⁵ *Id.*, p 15.

²⁶ *Id.*, pp 22-23.

you performed additional chores for her after the accident that you didn't do before the accident?

[Ms. Bryant] A: No.

Q: Was that no?

A: No.

* * *

Q: You can't think of any additional chores you took on after the accident that you didn't already do?

A: No.

Thus, Plaintiff was not employed, either before or after the auto accident. Plaintiff did not drive an automobile, either before or after the auto accident. Plaintiff was receiving disability-related social security benefits, both before and after the auto accident, due to chronic, long-term back pain caused by her pre-accident kidney removal. Finally, if Plaintiff required any post-accident assistance with her household chores after the accident, that was no different than her normal life before the accident, at which time her daughter was already assisting Plaintiff with those chores. Plaintiff failed to demonstrate *any* appreciable change in her normal life, post-impairment, let alone a change in the course or trajectory of her normal life, related to her mild closed head injury.

C. The Court of Appeals Erred in Failing to Correctly Apply *Kreiner* in Partially Reversing the Trial Court's Grant of Summary Disposition.

The trial court analyzed Plaintiff's mild closed head injury pursuant to the statutory language set forth in MCL 500.3135, as interpreted by this Court in *Kreiner*, and concluded that Plaintiff had not suffered a serious impairment of body function. The trial court's analysis is set forth in full in Defendants' application for leave to appeal, and will not be repeated here, but is incorporated here by reference.

The Court of Appeals majority devoted only a single paragraph of its opinion to Plaintiff's mild closed head injury in light of the *Kreiner* standards, stating:

The parties do not dispute the bare fact that plaintiff sustained a closed head injury. She was 67 years old at the time. The headaches of which she complains are irrelevant under *Kreiner*. However, she also asserts that she suffers from dizziness, confusion, and blurred vision as a result, she has a reduced ability to locomote independently, to perform routine tasks necessary to life, and to engage in the social activities she enjoyed previously. "We note that a self-imposed restriction *not* based on real or perceived pain can be considered." *McDaniel* [*v. Hemker*, 268 Mich App 269, 283 (2005)] (emphasis in original). These impairments may or may not be self-imposed, but they arise from dizziness and confusion *in addition to* pain. The "trajectory" of plaintiff's "normal" life, past the age of 70, where her ability to take care of herself and enjoy socializing with friends and family, would seem to have been, at least, potentially affected.

[*Minter v City of Grand Rapids*, 275 Mich App 220, 227-228 (2007).]

The Court of Appeals majority apparently declined to rely upon Plaintiff's self-imposed restrictions based on claims of headache pain, as it reached its finding of a threshold injury. Instead, the Court of Appeals majority relied upon Plaintiff's complaints of dizziness, confusion, and blurred vision.

Plaintiff testified at her deposition that she experienced dizziness only "once in a while," maybe "twice a month."²⁷ Plaintiff also testified that she had her vision checked, but the doctor "didn't find anything wrong with my vision."²⁸ With regard to complaints of confusion, Plaintiff's deposition testimony indicates that she complained of memory difficulties, such that she "can be talking and forget what I'm talking about sometimes," and she sometimes forgets to turn off the stove after cooking.²⁹

With regard to the Court of Appeals majority's finding that Plaintiff had a reduced ability to "locomote independently" and to "engage in the social activities she enjoyed previously," Defendants believe the Court of Appeals erroneously conflated complaints

that Plaintiff related to her cervical strain injury, with complaints that Plaintiff related to her mild closed head injury. Plaintiff clearly testified that her decision to eliminate card playing activities with her sisters and her decision to not “go out too much” was related to stiffness and pain in her neck and shoulders, which lasted only 5-6 months after the auto accident.³⁰ She also testified that any decrease in walking, running, and dancing to music was related to pain in her lower back.³¹ None of those complaints were related to Plaintiff’s mild closed head injury.

Finally, with regard to the Court of Appeals majority’s finding that Plaintiff had a reduced ability to “perform routine tasks necessary to life,” the Court of Appeals was apparently referring to household chores. According to Plaintiff’s daughter, Plaintiff was already receiving assistance with household chores prior to the auto accident. Furthermore, Plaintiff’s daughter testified that she did not perform any additional tasks around the house after Plaintiff’s auto accident, compared to the tasks she was already performing, before the auto accident.

The Court of Appeals majority did not apply the *Kreiner* test appropriately, to the facts presented in this case. Rather, it appears that the Court of Appeals majority may have been motivated to reach a specific result, out of sympathy to this elderly Plaintiff. As measured under the standards set forth in the statutory language of §3135 and in *Kreiner*, Plaintiff’s mild closed head injury did not qualify as “serious impairment of body function” because it did not affect Plaintiff’s general ability to lead her normal life.

²⁷ Plaintiff Dorothy Minter’s Deposition Transcript, Brief Supporting Defendants’ Summary Disposition Motion, Exhibit B, p 36.

²⁸ *Id.*, p 64.

²⁹ *Id.*, pp 35, 40.

³⁰ *Id.*, p 27.

³¹ *Id.*, pp 38-39.

IV. CONCLUSION.

WHEREFORE, Defendants respectfully request that this Court enter a peremptory order **REVERSING** the Court of Appeals decision and **REINSTATING** the trial court's order granting summary disposition to Defendants on all counts.

Respectfully submitted,

THE CITY OF GRAND RAPIDS,
a Michigan municipal corporation, and
JOHN EDWARD RHEEM WETZEL,
an individual,

Dated: January 3, 2008

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